

NOT FOR PUBLICATION - For Upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Crim. No. 2001-202
)	
ROBERT ALEXANDER BEST et al.,)	
)	
Defendants.)	
)	
(YUAN PING ZHENG, defendant named)	
in superseded indictment))	
_____)	

APPEARANCES :

Sarah Weyler, Esq.

Asst. U.S. Attorney

St. Thomas, U.S.V.I.

For the plaintiff,

George H. Hodge, Jr., Esq.

St. Thomas, U.S.V.I.

For the defendant Yuan Ping Zheng.

MEMORANDUM

Moore, J.

On May 16, 2001, the United States Coast Guard Cutter *Nunivak* intercepted, boarded, and detained the M/V *Cordeiro de Deus* approximately sixteen nautical miles generally east of St. Croix, one of the islands making up the United States Virgin Islands. Upon boarding the vessel, the Coast Guard discovered hidden in the cargo hold thirty-three aliens from the People's Republic of China. INS officials determined that the aliens

intended to enter the United States.

In a two-count indictment returned on June 7, 2001, Yuan Ping Zheng ["defendant" or "Zheng"], one of the Chinese aliens, Robert Alexander Best ["Best"], a Guyanese national, and two Brazilian crewmen were charged with conspiracy to bring illegal aliens into the United States and attempting to bring aliens into the United States for purposes of financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(i) & (v), and (B)(i). On August 31, 2001, Zheng acknowledged his guilt and pled guilty to the conspiracy charge before Magistrate Judge Geoffrey W. Barnard. Judge Barnard recommended that the District Court accept his guilty plea, see LRCr 56.1(b)(14)(A), which I did on November 2, 2001, see *id.* 56.1(c)(3) (stating that the "District Judge may accept, reject, or modify in whole or in part, the proposed findings, report and recommendations of the Magistrate Judge"). Also on August 31, 2001, all charges against the two Brazilian crewmen were dismissed on motion of the United States.

On September 7, 2001, the United States filed a superseding indictment charging Best and three unknown co-defendants with conspiracy to bring aliens into the United States and attempting to bring aliens into the United States in violation of the relevant provisions of 8 U.S.C. § 1324. On October 26, 2001, I granted Best's motion to dismiss the indictment for lack of

personal jurisdiction, holding that the Court lacked jurisdiction to try Best for violations of 8 U.S.C. § 1324 "because he was intercepted and seized while on a foreign vessel on the high seas without the consent of the country under whose flag he was sailing." (See Mem. Op. at 19 (entered Oct. 26, 2001).) On October 29, Zheng moved pursuant to Federal Rule of Criminal Procedure 32(e) to withdraw his guilty plea for the "fair and just reasons" that he has not yet been sentenced and the Court lacks jurisdiction over his person.

Rule 32(e) of the Federal Rules of Criminal Procedure provides:

If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason.

FED. R. CRIM. P. 32(e). Although it is within this Court's discretion to permit a defendant to withdraw a guilty plea before sentencing, Zheng has not carried his burden to show that there are grounds for withdrawal of the plea. See *Government of the Virgin Islands v. Berry*, 631 F.2d 214, 220 (3d Cir. 1980). In determining whether to grant Zheng's motion, I must consider the following three factors: (1) whether the defendant has made a credible assertion of innocence; (2) the weakness of the reasons for withdrawal of the plea; and (3) the existence of prejudice to the government. See *United States v. Jones*, 979 F.2d 317, 318

(3d Cir. 1992).

First, Zheng has not made a credible assertion of innocence. Indeed, he makes no assertion of his innocence at all. Although a defendant may not be required to assert innocence in order to withdraw a guilty plea, failure to do so will work heavily against withdrawal. See *Virgin Islands v. Petersen*, 19 F. Supp. 2d 430, 443 (D.V.I. 1998) (under *Jones*, the defendant's nonassertion of innocence, although not outcome determinative, weighs particularly heavily against withdrawal where the defendant has also not alleged that his guilty plea was made involuntarily); see *Jones*, 979 F.2d at 318 (observing that the defendant "*must not only assert his innocence, but give sufficient reasons to explain*" why he should be permitted to withdraw his knowing and voluntary plea (emphasis added)).

Second, that the Court dismissed the superseding indictment against Best for lack of personal jurisdiction is not a compelling reason to permit Zheng to withdraw his voluntary plea. Best timely filed his motion to dismiss for lack of jurisdiction on August 1, 2001, yet Zheng never joined in that motion and even pled guilty while the motion was still pending. A challenge to personal jurisdiction in a criminal action is waived if not promptly asserted. See WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 3D § 193, at 336 & n.19 (1999) ("[J]urisdiction over the person

. . . is waived unless promptly asserted."). Even if Best's timely motion to dismiss had accrued to Zheng for purposes of determining whether Zheng waived the defense, the defense anent Zheng was put to final rest by his voluntary plea of guilty and effective admission of all the facts essential to the conviction.¹ See *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999) (A valid plea of guilty constitutes a waiver of all nonjurisdictional defects and defenses.); *United States ex rel. Shank v. Pennsylvania*, 461 F.2d 61, 62 (3d Cir. 1972); *United States v. Ptomey*, 366 F.2d 759, 760 (3d Cir. 1966); see also WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 3d § 175, at 222 (1999); *id.* § 175, at 226 (noting that nonjurisdictional defenses will not survive a valid guilty plea); FED. R. CRIM. P. 12(b), (c), & (f). Moreover, it appears that Zheng, who has been represented by competent counsel throughout these proceedings, had a change of heart only after I decided Best's motion to dismiss, circumstances which further weaken his already tenuous position. See *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975) ("[I]f the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more

¹ Not only does Zheng not assert his innocence, but he makes no allegation that his plea was involuntary or not supported by relevant facts.

force.").

As it stands then, Zheng (1) does not assert his innocence, (2) voluntarily pled guilty, (3) effectively admitted the facts essential to the conviction, and (4) waived any defense based on personal jurisdiction. Moreover, Zheng does not explain why he did not join, before he changed his plea to guilty, in the defense he now seeks to assert. See *Barker*, 514 F.2d at 221. In short, Zheng presents no just and fair reason for withdrawing his plea. As a result, I need not consider whether the United States would be prejudiced by the withdrawal. *United States v. Martinez*, 785 F.2d 111, 116 (3d Cir. 1986) ("[T]he Government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a plea." (internal quotation omitted)). Accordingly, Zheng's motion will be denied. An appropriate order follows.

ENTERED this 20th day of November, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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For the plaintiff,

George H. Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For the defendant Yuan Ping Zheng.

ORDER

For the reasons stated in the accompanying Memorandum of
even date, it is hereby

ORDERED that defendant Yuan Ping Zheng's motion to withdraw
his guilty plea is **DENIED**.

ENTERED this 20th day of November, 2001.

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Crim. No. 2001-202
Order
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FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

Copies to:

Honorable Geoffrey W. Barnard

By: _____
Deputy Clerk

AUSA Sarah Weyler
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Mrs. Jackson
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